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No. 91-1521

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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This case involves the application of the multiple layers of prophylaxis established by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *Arizona* v. *Roberson*, 486 U.S. 675 (1988), and *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), in a setting that tests the limits of those rules. The court of appeals believed that it was constrained by this Court's decisions to suppress respondent's confession. But the court noted (Pet. App. 14a-15a) that "it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda's* auxiliary protections—and so demands exclusion of a

murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant asked for (and was afforded) the assistance of counsel." Review by this court is warranted to make clear that *Edwards* and its progeny do not impose a perpetual ban on police-initiated interrogation of suspects who invoke their *Edwards* right to counsel while in custody.

1. Respondent contends (Br. in Opp. 9) that "the Government egregiously misguides this Court on * * * the voluntariness of [respondent's] confession." In particular, respondent asserts (*id.* at 6) that he asked for a lawyer during the interrogation concerning the murder and that a police detective "directed" him to sign a waiver of rights card.

Respondents' factual assertions are based on his own testimony at the suppression hearing. As respondent concedes (Br. in Opp. 6-7), however, the trial court did not credit his testimony. Instead, the court found that, "as between those two accounts, that is the account given by [respondent] and Detective Gossage, the Court credits Detective Gossage's account." Pet. App. 20a. The trial court said:

> Having made this credibility finding which leads the Court to conclude that [respondent] was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that [respondent] understood his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

Id. at 21a-22a. Similarly, the court of appeals found (*id.* at 3a) that respondent was advised of his *Miranda* rights and chose to waive them. In short, both courts below found that respondent had made a "knowing, intelligent, and voluntary waiver of *Miranda*'s auxiliary protections." *Id.* at 14a.

Moreover, as respondent concedes (Br. in Opp. 7 n.1), he did not pursue the argument that his confession was involuntary before the court of appeals. Indeed, that court expressly stated (Pet. App. 5a n.2) that "[respondent] does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling." Thus, the court of appeals decided this case on the basis of undisputed findings that respondent's confession was knowing, intelligent, and voluntary. The court of appeals nevertheless believed that it was constrained by the prophylactic rules of *Edwards* v. *Arizona*, *supra*, *Arizona* v. *Roberson*, *supra*, and *Minnick* v. *Mississippi*, *supra*, to exclude respondent's voluntary confession. The government seeks review of that legal ruling.

2. Respondent asserts (Br. in Opp. 9-10) that the *Edwards* rule reflects this Court's recognition that police interrogation is "inherently coercive" and bars the admission of "coerced and unreliable confessions." But this Court has never held that police interrogation is "inherently coercive" in the sense that any confession obtained during police interrogation is ipso facto involuntary. On the contrary, the Court has recognized that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2210 (1991).[1]

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[1] Respondent contends (Br. in Opp. 9) that "[t]he Government inaccurately asserts that the [*Edwards*] rule protects the

Respondent asserts (Br. in Opp. 12) that "[i]t is difficult to imagine a situation where the police do not improperly influence an accused's decision when, knowing that the accused has asked for the assistance of counsel, the police reinitiate interrogation." The facts of this case, however, present such a situation. Respondent voluntarily confessed to his involvement in a murder more than five months after he invoked his right to counsel in connection with an unrelated offense, and after he had consulted repeatedly with counsel and entered a guilty plea to that offense.

3. a. Respondent contends (Br. in Opp. 13-16) that his decision to plead guilty to the drug offense was not sufficient to overcome the *Edwards* presumption. That is so, he contends (*id.* at 15-16) because his decision to plead guilty to the drug charge was not necessarily inconsistent with a continuing desire to deal with the police only through counsel on the unrelated murder charge. This argument, however, rests on the false premise that the *Edwards* presumption can be ended only by an event that conclusively establishes that a defendant now wishes to speak with the police. That this premise is false is demonstrated by the generally accepted principle that the *Edwards* presumption does not survive a break in custody. See *McNeil*, 111 S. Ct. at 2208. A defendant who has been released from custody after invoking

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accused only from police badgering." Contrary to respondent's contention, this Court repeatedly has recognized that the *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208; *Minnick* v. *Mississippi*, 111 S. Ct. at 489; *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990); *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984). Where there is no danger of police badgering, an absolute prohibition on police-initiated interrogation is unwarranted.

the right to counsel may or may not wish to speak to the police about a different charge thereafter; the same is true of a defendant who has entered a plea of guilty after invoking the right to counsel. Such intervening circumstances end the *Edwards* presumption not because they conclusively establish that the defendant does wish to speak to the police, but rather because they make it no longer reasonable irrebuttably to presume the contrary.

When a defendant has been released from custody or when, as in this case, a defendant's request for counsel has been honored, and he has entered a plea of guilty to the charges that prompted him to invoke the right to counsel, it is unlikely that he will feel badgered if the police subsequently approach him, repeat the *Miranda* warnings, and seek to question him concerning an unrelated offense. Rather, such a defendant will understand that he is simply being asked, in the context of an unrelated offense, to make "an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). In such circumstances, the prophylactic rule of *Miranda* suffices to ensure that defendants do not give statements to the police unless they freely choose to do so.

b. Respondent contends (Br. in Opp. 16-18) that the five-month interval between his invocation of the *Edwards* right and the initiation of interrogation is legally irrelevant, because the passage of time does not diminish the risk that questioning by the police will be perceived as badgering. That is not so. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota* v. *Murphy*, 465 U.S. 420, 433

(1984). In *Edwards*, moreover, only one day elapsed between the suspect's request for counsel and the reinitiation of interrogation. 451 U.S. at 478-479. The danger of badgering is greatly reduced when the police have honored the suspect's request for counsel and have made no effort to interrogate the defendant for more than five months after the assertion of his right.[2]

c. Respondent contends (Br. in Opp. 18-20) that the government is attempting to "muddy the specificity of the *Miranda-Edwards* rule" by arguing that it should not apply if the suspect's request for a lawyer has been honored *and* the questioning concerns an offense that is unrelated to the offense that prompted the suspect's invocation of the *Edwards* right. Even if this Court were to adopt the "bright-line" rule that the *Edwards* presumption lasts as long as the suspect remains in custody, the police would still be required to answer a number of difficult questions, such as whether a particular suspect is "in custody," whether the suspect has invoked the *Edwards* right to counsel at some point, whether there has been a break in custody since the invocation, and whether the suspect has waived the *Edwards* right. Moreover, this Court has recognized that prophylactic rules should be "'clear and unequivocal' * * * only when they guide sensibly." *McNeil*, 111 S. Ct. at 2211. Applying the *Edwards* presumption in the circumstances of this

[2] In the alternative, respondent argues (Br. in Opp. 17) that if the risk of badgering was attenuated by the passage of time, that risk was reintroduced in his case when he was awakened at 4 a.m. and taken to the police station. The time at which respondent was awakened had some relevance to the question whether his confession was voluntary; it has no relevance, however, to the general question whether the prophylactic rule of *Edwards* should last indefinitely.

case would not afford any significant protection to the suspect's constitutional rights, and would substantially hinder police investigation of the many persons who are investigated for multiple crimes and who at some point invoke the right to counsel in connection with a previous offense.

Finally, respondent contends (Br. in Opp. 19-20) that the confusion in the lower courts over whether *Edwards* creates a perpetual irrebuttable presumption was resolved by this Court's decision in *Minnick*. But *Minnick* did not address the question whether the *Edwards* presumption is perpetual; instead, it held that the presumption is not automatically dissolved when the police honor the suspect's request to consult with counsel. Consequently, *Minnick* has not resolved the question presented in this case.

For the foregoing reasons, and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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